Petition

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ALEXANDER L. STEVAS
CLERK

81-1598

No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLE RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE; SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1. Pursuant to the Supremacy Clause (US Const, Art VI, cl 2), is not the Twenty-first Amendment as much a part of the law of every State as its own constitution?

2. Can the Federal constitutional guarantee of power to the States to regulate the sale of alcoholic beverages, which this Court has construed to include the power to prohibit such sale, on premises which feature topless dancing, without violating the First Amendment, be limited by a State constitutional guarantee of rights of free expression to topless barroom dancers?

3. Is the decision of the New York State Court of Appeals on reargument consistent with the remand of this Court?

Parties.

All parties to the action are named in the caption. On reargument of this case following the remand of this Court (*State Liquor Authority v. Bellanca, et al.*, ____ US ____, 49 USLW 3950, 101 S Ct 2599, 69 L Ed 357 [June 22, 1981]), the Association of Adult Entertainment Taverns appeared as *amicus curiae* in the New York State Court of Appeals.

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No. 81—

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

DENNIS BELLANCA, d/b/a The Main Event; JAMES C. DEMARCO, d/b/a Colonie Restaurant; BIAGIO DI-BLASI & GENNIE PALOMBO, d/b/a Frank's Casa Nova; VINCENT IUDICE, d/b/a 19th Hole Restaurant; PETER KACHINOSKI, d/b/a Kach's Corner; JACOB P. PAGANO, d/b/a The Silver Coach; RON PAOLINI, d/b/a Fridays and Saturdays Lounge; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a Shveedee's Lounge; NEAL RADICE, d/b/a Radice's Lounge; SAMUEL RESMAN, d/b/a Glo Mar Bar; TALE OF THE TIGER, Inc., d/b/a Flay's Steak Pub; LEONARD ZAMBITO, d/b/a Lenny's Blue Velvet Lounge,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the New York State Court of Appeals is reported in 54 NY2d 228 (Advance Sheet No. 208), and a copy is attached hereto at Appendix A-1. Prior opinions and decisions rendered in this matter are reported in 50 NY2d 524, revd ____ US ____, 49 USLW 3950, 101 S Ct 2599, 69 L Ed 357 (June 22, 1981) and are attached hereto at Appendix A-2 *et seq.*

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 USC 1257(3) and U.S. Supreme Court Rule 17.1(c) (*cf.* also: *Coleman v. Miller,* 307 US 433, 443 [1939]), because a State statute banning topless dancing on premises licensed by the State to serve alcoholic beverages has been declared unconstitutional under the State constitutional guarantee of freedom of expression on the ground that the Twenty-first Amendment, interpreted by this Court to sustain such a statute, has "no application" to the New York State Constitution. Such holding ignores the clear language of Article VI of the Federal Constitution, thus presenting a Federal question of substance in a way probably not in accord with applicable decisions of this Court; ignores this Court's prior remand in this very case; and violates the petitioner's and the New York State Legislature's absolute right under the Twenty-first Amendment to regulate the sale of alcoholic beverages within New York State.

The order sought to be reviewed was entered November 23, 1981. This petition filed pursuant to 28 USC 1257(3) is therefore timely.

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Art VI, cl 2

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Constitution of the United States, Amendment X

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution of the United States, Amendment XXI, §2

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the Laws thereof, is hereby prohibited."

New York State Constitution, Art I, §8

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the

> matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

New York State Alcoholic Beverage Control Law, §106(6-a) (New York Session Laws, 1977, ch 321; McKinney's Consolidated Laws of New York, Vol 3, pocket supplement 1981-1982, p 60):

> "No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof."

Statement of the Case.

Respondents are operators of licensed premises featuring so-called "topless entertainment." In 1977, following this Court's decision in *Doran v. Salem Inn, Inc.*, 422 US 922, the New York State Legislature amended the Alcoholic Beverage Control Law to ban topless waitresses and topless female dancers in bars and nightclubs. (The statute would not apply to legitimate theaters where stage and seating areas are not part of the licensed premises.) Respondents initiated an action for a declaratory judgment and injunctive relief in State Supreme Court seeking to have the amendment declared unconstitutional under the State and Federal Constitutions, alleging that they would lose "business if dancers' breasts were required to be covered", and that the amendment is violative of the guarantees of freedom of expression under the State and Federal Constitutions.

State Supreme Court granted summary judgment to the respondents on the complaint. Petitioner appealed to the New York State Court of Appeals, which by a divided Court (4-3) affirmed judgment for respondents solely on Federal First Amendment grounds (50 NY2d 524, at 528, fn 5).

On certiorari, this Court reversed the State Court of Appeals, holding that the State's broad power under the Twenty-first Amendment to ban the sale of alcoholic beverages entirely, includes the lesser power to ban the sale of liquor on premises where topless dancing occurs (A-35).

> "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts."

This Court remanded the case for further proceedings not inconsistent with that opinion.

On the hearing following this Court's remand, the New York State Court of Appeals by the very same 4-3 vote which occurred initially, held that the Twenty-first Amendment "has no application" to the State Constitution and that the statute violated the State Constitution's guarantee of freedom of speech (54 NY2d 228, 230). The Court of Appeals expressly declined to consider whether it would interpret the state constitutional guarantee to be broader than that of the First Amendment (54 NY2d 228, 234-235).

REASONS FOR ALLOWANCE OF THE WRIT.

POINT I.

The Twenty-first Amendment, which guarantees to the State the absolute right to control and even prohibit totally the dispensation of alcoholic beverages within its borders, is, pursuant to the Supremacy Clause, as applicable to a State Constitution as it is to the Federal Constitution.

The Court below found a State statute regulating the dispensation of alcoholic beverages on premises that feature topless entertainment unconstitutional under the State constitutional guarantee of freedom of expression (NY State Const, Art I, §8) on the ground that the Twenty-first Amendment to the United States Constitution, which gives the State absolute power to regulate in this area, has no application to the State Constitution.

In doing so, the Court below expressly declined to interpret the State constitutional guarantee as providing any broader protection than is conferred by the First Amendment of the Federal Constitution, which this Court in this very case has already held not to be violated by the State regulation here challenged.

Petitioner submits that the Court below erred since the Supremacy Clause (US Const, Art VI) clearly makes the Twenty-first Amendment as applicable to the State Constitution as if it were incorporated verbatim therein, and the Twenty-first Amendment gives the State the absolute right to regulate the sale of alcoholic beverages, "anything in the constitution or laws of any state to the contrary notwithstanding."

As long ago as 1816, This Court, in *Martin v. Hunter's Lessee,* 1 Wheat 304, held (at 339):

> "It is obvious, that this obligation [i.e., US Const, Art VI] is imperative upon the state judges, in their official, and not merely in their private, capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. *They were not to decide merely according to the laws or constitution of the state,* but according to the constitution, laws and treaties of the United States—'the supreme law of the land.' " (Emphasis supplied.)

In *Mondou v. New York, New Haven & Hartford Railroad Co.,* 223 US 1 (1911), this Court held (at 57):

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. *That policy is as much the policy of Connecticut as if the act had emanated from its own legislature,* and should be respected accordingly in the courts of the State." (Emphasis supplied.)

The Court below therefore erred in holding that the Twenty-first Amendment had "no application" to the State Constitution, and such determination is in violation of the Supremacy Clause of the United States Constitution.

POINT II.

The determination sought to be reviewed is contrary to the State's federal constitutional powers, and fails to comply with the remand of this Court.

In the prior decision herein, it was held (A-33, 34):

> "This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939).
>
> * * *
>
> "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."

The State's Twenty-first Amendment powers guaranteed to it by the Federal Constitution are tantamount to and the equivalent of a Federal constitutional right (*cf. Gordon v. United States,* 117 US 697 [1864]). Police powers are in effect States' rights, guaranteed by the Tenth Amendment, and in the context of regulating the dispensation of alcoholic beverages find additional authority beyond the scope of ordinary police power "by the broad sweep of the Twenty-first Amendment" (*California v. LaRue,* 409 US 109, 114 [1972]).

A State constitutional provision is a statute (*Prune Yard Shopping Center v. Robins,* 447 US 74, 79 [1979]). In the instant case, a State "statute" has been interpreted by a State Court in such fashion as to deny the State its federally guaranteed right to regulate the sale of alcoholic beverages. In view of the clear federally guaranteed right of regulation in this area, such interpretation of State law is unconstitutional under the Federal Constitution and

must be reversed (*cf. N.A.A.C.P. v. Thompson,* 357 F2d 831 [CA 5th, 1966], cert den 385 US 820; *Wight v. Police Jury,* 264 F 705 [CA 5th, 1919]).

> "This great principle is, that the Constitution and the laws made in pursuance thereof are supreme, that they control the constitution and the laws of the respective states and cannot be controlled by them." (*McCulloch v. Maryland,* 4 Wheat 316, 426 [1819])

CONCLUSION.

A writ of certiorari should be issued to the New York State Court of Appeals to review its determination that New York State's constitutional guarantee of freedom of expression precludes the State from exercising its federally guaranteed power to regulate the sale of alcoholic beverages by prohibiting such sale on premises which feature topless dancing.

Dated: Albany, New York
February 9, 1982

Respectfully submitted,

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Appendix

DENNIS BELLANCA, Doing Business as THE MAIN EVENT, et al., Respondents, v NEW YORK STATE LIQUOR AUTHORITY et al., Appellants.

Argued October 15, 1981; decided November 23, 1981

SUMMARY

REARGUMENT of an appeal, taken on constitutional grounds, from a judgment of the Supreme Court at Special Term (JOHN H. DOERR, J.), entered June 21, 1979 in Erie County, which granted plaintiffs' motion for summary judgment declaring subdivision 6-a of section 106 of the Alcoholic Beverage Control Law unconstitutional as applied to topless dancing in premises licensed to sell liquor and, to that extent, enjoined its enforcement. Following affirmance by the Court of Appeals upon the original appeal (50 NY2d 524), the United States Supreme Court reversed the judgment and remanded the case to the Court of Appeals for further proceedings not inconsistent with the opinion of the United States Supreme Court (452 US —, 101 S Ct 2599).

Plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is unconstitutional to the extent that it prohibits all topless dancing at premises licensed by the New York State Liquor Authority to sell liquor at retail for consumption on the premises. The trial court found that topless dancing is a form of expression protected by the First Amendment to the United States Constitution and that the State had failed to demonstrate some serious and compelling reason to limit it. On direct appeal, the Court of Appeals affirmed, holding that topless dancing is entitled to at least a minimum of protection under the First Amendment and that the State cannot arbitrarily prohibit it in all places licensed to sell alcoholic beverages. The United States Supreme Court reversed and remanded the case to the Court of Appeals, holding that said prohibition of topless dancing in premises licensed by the State to sell alcoholic beverages is valid under the Federal Constitution by reason

On reargument following remand, the Court of Appeals affirmed the judgment, holding, in an opinion by Judge JONES, that the blanket prohibition of all topless dancing in premises licensed by the State Liquor Authority contained in subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is invalid under the guarantee of freedom of expression declared in section 8 of article I of the New York State Constitution.

HEADNOTE

Intoxicating Liquors — Licenses — Topless Dancing

Although the blanket proscription against topless dancing in premises licensed by the New York State Liquor Authority contained in subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is valid under the United States Constitution in consequence of the provisions of the Twenty-first Amendment, said categorical ban is invalid under the guarantee of freedom of expression declared in the New York State Constitution (art I, § 8), to which the Twenty-first Amendment has no application; however, the Legislature or the State Liquor Authority may, without infringement of the constitutional prescriptions, prohibit obscene dancing and may regulate, even to the extent of prohibition, nonobscene topless dancing in circumstances so functionally related to the exercise of the State's authority to regulate the sale and consumption of alcoholic beverages as to overcome the applicable constitutional protection of freedom of expression.

POINTS OF COUNSEL

Robert Abrams, Attorney-General (Peter J. Dooley and *Jeremiah Jochnowitz of counsel)*, for appellants. Alcoholic Beverage Control Law (§ 106, subd 6-a) is neither vague nor overbroad and does not violate section 8 of article I of the New York Constitution. *(California v La Rue*, 409 US 109; *Matter of J. D. H. Rest. v New York State Liq. Auth.*, 21 NY2d 846; *People v Stover*, 12 NY2d 462; *Matter of Scott v Board of Educ.*, 61 Misc 2d 333; *Tinker v Des Moines School Dist.*, 393 US 503; *People v Kovner*, 96 Misc 2d 414; *Ferguson v Skrupa*, 372 US 726; *People v Broadie*, 37 NY2d 100; *Matter of Beal Props. v State Liq. Auth.*, 37 NY2d 861; *People v Moreira*, 70 Misc 2d 68.)

George P. Doyle for respondents. I. Subdivision 6-a of section 106 of the Alcoholic Beverage Control Law violates the New York State constitutional guarantee of freedom of expression. *(Larkin v Putnam's Sons*, 14 NY2d 399; *Tucker v Toia*, 54 AD2d 322; *Matter of McCann v Walsh Constr.*

Co., 282 App Div 444, 306 NY 904; *Beneficial Fin. Co. of N. Y. v Bond*, 83 Misc 2d 9; *Doran v Salem Inn*, 422 US 922.) II. The statute is void for vagueness and overbreadth. (*United States v Harriss*, 347 US 612; *People v Scott*, 26 NY2d 286; *Wegman's Food Markets v State of New York*, 76 AD2d 95; *Gooding v Wilson*, 405 US 518.)

Jay M. Zerin for Association of Adult Entertainment Taverns, *amicus curiae*. I. Topless dancing is a constitutionally protected form of expression. (*Bellanca v New York State Liq. Auth.*, 50 NY2d 524; *Matter of Beal Props. v State Liq. Auth.*, 45 AD2d 906; *California v La Rue*, 409 US 109.) II. A State's constitutional provision which is identical to a provision of the United States Constitution may be more broadly interpreted by the State courts than the identical provision of the Federal Constitution is interpreted by the United States Supreme Court. (*Matter of McCann v Walsh Constr. Co.*, 282 App Div 444; *Ives v South Buffalo Ry. Co.*, 201 NY 271; *New York City v Central Sav. Bank*, 306 US 661; *PruneYard Shopping Center v Robins*, 447 US 74; *Lloyd Corp. v Tanner*, 407 US 551; *Cooper v California*, 386 US 58.) III. New York has acted improperly in attempting to regulate conduct commonly known as topless dancing under the powers granted to it by the Twenty-first Amendment to the United States Constitution.

OPINION OF THE COURT

JONES, J.

The guarantee of freedom of expression declared in our State Constitution mandates invalidation of the blanket proscription against all topless dancing in premises licensed by the State Liquor Authority presently stated in subdivision 6-a of section 106 of the Alcoholic Beverage Control Law. Although that statutory ban has been held to be valid under the Federal Constitution in consequence of the provisions of its Twenty-first Amendment, it is invalid under the guarantee of freedom of expression of our State Constitution, as to which the Twenty-first Amendment has no application.

This case is now before us on remand from the Supreme Court of the United States (— US —, 49 USLW 3950). On

our prior consideration a majority in our court held that subdivision 6-a of section 106 of the Alcoholic Beverage Control Law[1] was unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits topless dancing at premises licensed by the State Liquor Authority (50 NY2d 524, rearg and amdt of remittitur den 51 NY2d 879). On that occasion we found it unnecessary to consider the parallel contention that the statute was unconstitutional under section 8 of article I of our State Constitution (50 NY2d 524, 528, n 5, *supra*).

The rationale of the majority then was that the Supreme Court had recognized dancing as a form of expression and had held that topless dancing, like nudity in art and sculpture, was to be accorded at least limited protection under the First Amendment *(Doran v Salem Inn*, 422 US 922). We explicitly took note of what we considered a critical circumstance in the case, namely, that the statutory provision under scrutiny barred *all* topless dancing—"The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances" (50 NY2d 524, 529, *supra*). We then recognized, as we do now, the right of the Legislature or the State Liquor Authority without infringement of the constitutional prescriptions to prohibit or to regulate topless dancing on either of two bases. If the dancing is itself found to be obscene there can be no question but what it falls outside the shelter of any constitutional right of expression. Or, topless dancing although not obscene may be regulated, even to the extent of its prohibition, in circumstances so functionally related to the exercise of the State's authority to regulate the sale and consumption of alcoholic beverages as to overcome the applicable constitutional guarantee of freedom of expression, as for instance,

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1. Subdivision 6-a (added by L 1977, ch 321) provides: "No retail licensee for on-premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof."

by a rule, such as that of the State Liquor Authority in effect prior to the legislative enactment of subdivision 6-a, prohibiting topless dancing performed on a stage or platform less than 18 inches above the immediate floor level or removed by less than 6 feet from the nearest patron (9 NYCRR 53.1[s] prior to its amendment[2]).

The determinative infirmity in the enactment of subdivision 6-a by the Legislature was the total absence of any findings by the Legislature or by the State Liquor Authority to support a rationally based factual justification for the blanket prohibition. Chapter 321 of the Laws of 1977 was predicated on no legislative finding and it included no declaration of legislative intent.[3] It was merely a straight-

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2. Prior to its amendment effective August 31, 1977 (the same date chapter 321 of the Laws of 1977 became effective), section 53.1 of the rules of the authority provided in pertinent part:

"Any license or permit issued pursuant to the Alcoholic Beverage Control Law may be revoked, cancelled or suspended for the following causes:

* * *

"(s) for suffering or permitting any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof. The provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed by at least six feet from the nearest patron."

Effective August 31, 1977 subdivision (s) was amended to read: "For suffering or permitting any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof." In its original form subdivision (s) conformed to the provisions of rule 143.3 of the California Department of Alcoholic Beverage Control as to which no claim of unconstitutionality was raised in *California v La Rue* (409 US 109, 112, n 2) and which provided in its subdivision (2): "Subject to the provisions of Subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only when a stage is at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron."

3. To the extent that the *Per Curiam* opinion in the Supreme Court may be read as concluding that such findings did exist in this case we cannot agree. It is true, as recited in that opinion, that the memorandum of the Assemblyman who introduced the bill, as was to be expected, contained a statement of his objective in introducing his bill. Although his memorandum might perhaps be classified as part of the legislative history, and thus possibly available to assist in the interpretation of this statute were it ambiguous, there is nothing to suggest that it was adopted by the Legislature or otherwise converted into legislative findings as a premise for enactment of the statute. Nor have we found any other document which may be classified as containing findings or a declaration of purpose by the Legislature.

forward, unembellished amendment of section 106 to add a new subdivision. Nor was the amending bill introduced by the State Liquor Authority or accompanied by any memorandum from the authority in support of its enactment. Presumably the authority had been content with the adequacy, for purposes of the discharge of its supervisory responsibility, of its own existing 18-inch 6-foot rule.

The dissenters in our court expressed the view, corresponding to that of the majority in the Supreme Court, that even if it were to be concluded that subdivision 6-a would otherwise be unconstitutional under the First Amendment its enactment by the State would be authorized under the provisions of the Twenty-first Amendment of the Federal Constitution.[1]

The Supreme Court expressly upheld the validity of subdivision 6-a against attack under the Federal Constitution on the ground that its adoption was permitted under the provisions of the Twenty-first Amendment. "This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. * * * It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold * * * Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs * * * Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment." (— US —, —, 49 USLW 3450, 3951, *supra.)*

The posture in which we confront this case on remand can thus be summarized as follows. When the case was previously before us the majority held subdivision 6-a un-

1. As the dissenters recognized, "It is, of course, far too late in the day to suggest that dancing, even topless or nude dancing, is entitled to absolutely no First Amendment protections." (50 NY2d 524, 532, *supra.)*

constitutional as violative of the First Amendment of the United States Constitution; the dissenters would have held that in view of the authority granted the States by the Twenty-first Amendment to regulate the sale and use of liquor, the provision of subdivision 6-a was not irrational and accordingly should be upheld. The Supreme Court similarly upheld subdivision 6-a against challenge under the Federal Constitution on the ground that the broad provisions of the Twenty-first Amendment substantially curtailed the operative scope of the First Amendment. Nothing in its opinion intimates, however, that it would have upheld the subdivision against First Amendment challenge had there been no Twenty-first Amendment.

We are, of course, bound by the decision of the Supreme Court as to the validity of subdivision 6-a under the provisions of the Federal Constitution. We are now called on to consider the validity of the subdivision under the provisions of our State Constitution, an issue which we did not address when the case was before us on the prior occasion and which, of course, was not within the scope of the Supreme Court's review.

We perceive no reason to depart from our conclusion, reached before, that subdivision 6-a in its present form is violative of a constitutional guarantee of freedom of expression. In arriving at this result we have no occasion to consider whether our State constitutional guarantee is broader than the guarantee of the Federal Constitution.[5]

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5. First Amendment of the United States Constitution:

"Freedom of religion, speech and press; peaceful assemblage; petition of grievances

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 8 of article I, of the New York State Constitution: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

For present purposes it suffices to observe that, at the very least, the guarantee of freedom of expression set forth in our State Constitution is of no lesser vitality than that set forth in the Federal Constitution (considered without reference to the curtailing effect of its Twenty-first Amendment). Our State Constitution contains no provision modifying the State guarantee of freedom of expression corresponding to what the Supreme Court has held is the diminishing effect of the Twenty-first Amendment with respect to the Federal guarantee of freedom of expression. We therefore hold that subdivision 6-a is unconstitutional under the provisions of our State Constitution.

Nor is there anything in the Twenty-first Amendment itself which inhibits or modifies the right of freedom of expression assured by our State Constitution. As read by the Supreme Court, the Twenty-first Amendment recognizes, so far as the restrictive provisions of the Federal Constitution are concerned, the absolute power of a State to prohibit totally, and consequently to regulate, the sale of alcoholic beverages. Appellants do not assert, however, that the source of the State's authority to regulate the sale and consumption of alcoholic beverages is to be found in the Twenty-first Amendment. Contrary to the position now advanced by one of the dissenters, the authority of our State in this respect stems not from any grant to be found in the Federal Constitution but derives from the inherent police power of the State as a sovereign (see 9 NY Jur, Constitutional Law, § 143; US Const, 10th Amdt).[6] The exercise of the police power by the State Legislature is necessarily subject to the strictures of our State Constitution, of which the guarantee of freedom of expression found

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6. The quotation from *Seagram & Sons v Hostetter* (16 NY2d 47, 56), cited in the dissent, relied for its authority on *Mahoney v Triner Corp.* (304 US 401). That case, however, stands only for the proposition that (p 404) "[i]ndependently of the Twenty-first Amendment, the State had power to [regulate the sale of intoxicating liquors]" and that since the adoption of the Twenty-first Amendment the State's exercise of that power is not subject to attack on grounds of denial of equal protection under the Fourteenth Amendment of the Federal Constitution—in effect a holding with respect to the interplay between the Fourteenth and Twenty-first Amendments of the Federal Constitution paralleling that of the Supreme Court in this case with respect to the interplay between the First and Twenty-first Amendments of the Federal Constitution.

in section 8 of article I is controlling in this instance.[7] The Supreme Court has never espoused the proposition that the Twenty-first Amendment of the Federal Constitution confers a power on the States which is superior to or free from the constraints of their own Constitutions, and nothing cited by the dissenters is to the contrary.

Accordingly, we hold that the present statutory ban against topless dancing in premises licensed by the State Liquor Authority is prohibited by the guarantee of freedom of expression declared in section 8 of article I, there being no legislative findings or declaration in this instance providing warrant for the judicial conclusion that the categorical ban is sufficiently functionally related to the exercise of the State's police power in the discharge of the responsibilities vested in the State Liquor Authority.[8]

For the reasons stated, the judgment of Supreme Court should be affirmed, with costs.

FUCHSBERG, J. (concurring). Because Judge JONES' analysis of the controlling constitutional and procedural issues—with all of which I agree—does not focus on the

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7. The statement found at the conclusion of the *Per Curiam* opinion in the Supreme Court, that "the Twenty-first Amendment makes [the prohibition of topless dancing] a policy judgment for the state legislature, not the courts" (— US —, —, 49 USLW 3950, 3951, *supra*), is incomplete; any policy judgment made by our Legislature must necessarily conform to the commands of our State Constitution.

8. In Matter of *Real Props. v State Liq. Auth.* (37 NY2d 861, 862) we held that the State Liquor Authority did not have authority to impose a sanction against nude dancing "absent a regulation by the agency giving notice that conduct not lewd or indecent per se was proscribed". That decision may not properly be read as implying that just any regulation, regardless of its constitutional validity, would serve to confer such authority. What the agency adopted following our decision in that case was the presently unchallenged 6-foot 18-inch regulation referred to (*supra*, at p 232).

We do not now undertake to define the standard to be applied under our State Constitution to determine whether a particular regulation of speech or conduct in connection with the sale or consumption of alcoholic beverages violates the guarantee of freedom of expression declared in section 8 of article I. It would seem that the test would be higher than that of mere rational relationship, the standard required for the justification of any exercise of the police power quite independent of the provision of section 8 of article I. Presumably, too, the standard would be significantly different depending on the nature of the speech or conduct to be regulated, e.g., as between topless dancing, on the one hand, and political activity, on the other, assuming indeed that the latter would be subject to any such regulation.

practical nature of the imposition on freedom of expression which we strike down anew today, I add this additional comment for myself:

Licensed liquor establishments, regardless of whether they provide nonobscene topless dancing entertainment, may not dispense alcoholic beverages to minors (Alcoholic Beverage Control Law, § 65).

As to adults, such performances are not thrust upon the patrons. Those who, understandably, do not choose to attend, should be, and are, perfectly free to stay away, and, presumably, they exercise that right. Our profound commitment to personal liberty demands not only that we respect their right to do so, but, correlatively, that we evince like respect for the right of adults who elect to attend. In a free society, one such right could not long exist without the other.

The protection of both is implicit in section 8 of article I of our State Constitution. Its guarantee is not confined to the expression of ideas that are conventional or those shared by a majority.

GABRIELLI, J. (dissenting). I am again impelled to dissent from the majority's holding that the Legislature has no power to proscribe female topless dancing in an establishment which is licensed by the State Liquor Authority to dispense alcoholic beverages for on-premises consumption.

When the appeal was previously before this court, the majority declared the statutory ban on topless dancing in licensed establishments unconstitutional, as a consequence of the statute's impermissible infringement on the Federal Constitution's guarantee of the freedom of expression (US Const, 1st Amdt). The majority there declared that the State had not justified its attempt to regulate the mixture of topless dancing and alcohol. In so doing, our court failed to appreciate the broad power given the State by the Twenty-first Amendment to regulate the sale of liquor within its boundaries (*Bellanca v New York State Liq. Auth.*, 50 NY2d 524). Having been reversed by the United States Supreme Court on this point directly (*New York*

State Liq. Auth. v Bellanca, — US —, 101 S Ct 2599), the majority now turns to our State Constitution to reach the same result. I cannot agree.

In its reliance on the State Constitution (NY Const, art I, § 8), the majority, for the first time, holds legislative activity to be unlawful on the basis of its infringement on the freedom of expression, notwithstanding the fact that the United States Supreme Court has clearly and expressly declared that the statute is within the ambit of State legislative power. The basis for the present holding by the same Judges who comprised the majority whose decision, as noted, was reversed by the Supreme Court, is that our State Constitution, whose guarantee of freedom of expression is worded in the same terms as the Federal guarantee,[1] nevertheless does not contain a counterpart of the Twenty-first Amendment. Thus, it is intimated, in the absence of such a proclamation in our Constitution, the State is forbidden the power to regulate the sale of liquor, where that regulation impairs, in any way, some form of the freedom of expression.

I do not quarrel with the use of our State Constitution to afford broader guarantees to individuals than those granted by the Federal Constitution. Indeed, in a proper case, we have full authority to construe our own Constitution to provide such greater protections. I do not agree, however, with the development of a separate jurisprudence relative to the right of freedom of speech, in the absence of a legally compelling reason for doing so. I am entirely unpersuaded by the rationale of the majority, predicated as it is on the absence of the equivalent of a Twenty-first Amendment in our State Constitution. The Supreme Court has flatly and squarely held that the "State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries * * * It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold" (*New*

1. It must be conceded, and indeed the majority does not controvert or deny, that the provisions of the State and Federal Constitutions do not differ in any significant respect.

York State Liq. Auth. v Bellanca, — US —, —, 101 S Ct 2599, 2600, *supra*). To now require, as a precondition to the exercise of such power in a manner expressly condoned by the highest court of this Nation, that the State must enact its own counterpart of the Twenty-first Amendment, is without reason or authority.

Even assuming, *arguendo*, the propriety of proceeding unhampered by the permissive scope of the Twenty-first Amendment, I have further disagreement with the majority's holding. As the Supreme Court has noted, "the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression" (*Doran v Salem Inn*, 422 US 922, 932). Indeed, our own court, on the prior appeal in this very case, recognized that this form of activity is entitled to only "*some* constitutional protection" (*Bellanca v New York State Liq. Auth.*, 50 NY2d 524, 531, *supra* [emphasis added]). The court there also noted that the State must demonstrate a rational connection between the activity to be prohibited and the State's "legitimate concern in controlling liquor consumption".[2] Of course, our function is limited to making certain that a rational connection exists.

Thus, it appears conclusively that the State need only advance a rational justification for its prohibition on topless dancing in the circumstances presented here. Without question, I believe it has done so. In this connection, I note the legislative support memorandum accompanying the challenged amendment to section 106 of the Alcoholic Beverage Control Law:

"Nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances may constitute

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2. The court emphasized this pronouncement on the level of justification that must be offered by the State in the following statement: "Of course when the State seeks to prohibit more traditional forms of expression, it must make a more compelling showing of need for the restriction. For instance, it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide" (*Bellanca v New York State Liq. Auth.*, 50 NY2d 524, 531, n 7).

disorderly behavior within the meaning of the Alcoholic Beverage Control Law. What soberness and dress conceal, drunkenness and nudity reveal. Freedom, undisciplined by a sense of responsibility in its use, can produce chaos.

"Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."

This memorandum was quoted with approval by the United States Supreme Court, in support of its view that even if explicit legislative findings were required to uphold the ban on topless dancing, they exist in this case. The majority proclaims, without citation of authority or good reason, that these statements are not sufficient. Thus, the majority would apparently deprive the Legislature of the power to use its "common sense", as it professed to do in its support memorandum. It is concluded that this memorandum was not adopted by the Legislature, nor, it is said, is there any declaration of legislative intent. Contrary to this conclusion, it is noteworthy that the memorandum is reprinted in the 1977 New York State Legislative Annual (at p 150), whose prefatory remark states: "The Legislative Annual compiles primary source material on New York State legislation for the 1976 regular and extraordinary sessions. By annotating each bill enacted into law with its most pertinent memoranda, which were prepared by the agencies or individuals initiating or recommending particular legislation, the Annual provides contemporaneous documentation of legislative intent". I think it can safely be concluded that the Legislature was aware of its sponsoring member's memorandum. In the absence of any indications to the contrary, we can also properly conclude that it adopted that rationale in approving the legislation itself.

Thus, the Legislature has made clear the basis for its proscription of topless dancing on licensed premises. It has determined that nudity coupled with the public consumption of alcohol "begets undesirable behavior". Surely the Legislature is in a better position to make that determination than is this court. The majority of this court nevertheless concludes that this finding is insufficient. I am at a

loss to discern what type of finding would be required before what is essentially a " 'time, place and manner' " restriction on a nonobscene display of the human anatomy (see *Young v American Mini Theatres*, 427 US 50, 58, and analysis thereof; Nowak, Rotunda & Young, Constitutional Law, at pp 845-846; cf. *FCC v Pacifica Foundation*, 438 US 726) will be permitted by this court. I can only wonder what findings this court would now require if faced with the question of when the Legislature can properly prohibit topless dancing on our public streets, or indeed, on the steps of our own courthouse.[3] The fallacy in the majority's analysis rests in the imposition on the State Legislature of a high and specific threshold of findings concerning a right which is concededly entitled to only the "barest minimum" of constitutional protection.

The majority expresses concern that the State Liquor Authority neither introduced the amendment in question nor submitted a memorandum in support of its enactment. Thus, they conclude that the authority must have been content with its prior rules regulating topless appearances in licensed premises. In this connection, I note the memorandum to the Governor from the chairman of the State Liquor Authority, which, although received after action by the Governor, recommended approval of the amendment prohibiting nudity in licensed premises. This memorandum states: "Sponsors of the bill argue that there is an ever growing proliferation of topless dancing and go-go establishments, many of which are now creeping into residential areas and operating within short distances of churches and schools. Some of these establishments are being located in areas which are undergoing severe transition and their presence acts as an additional irritant and causes homeowners to move to other communities. The bill would help to combat the pernicious effect of sex oriented businesses."

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3. I do not, of course, ascribe to the majority's holding the view that legislation prohibiting such conduct is unconstitutional (see Penal Law, §§ 245.00, 245.01, 245.02). However, inasmuch as such legislation is apparently based on the State's interest in preventing indecent conduct in public and on the necessity of avoiding public disturbance, my difficulty rests merely with the character of legislative findings that would be required before such proscriptions will be found valid.

Thus, it is clear that the majority's concern over the State Liquor Authority's position (or claimed lack thereof) on topless barroom dancing is unfounded. Moreover, the authority's position is really irrelevant to our determination in this case. We are to be concerned only with the Legislature's findings and actions, and not those of its agency. Frankly, the majority's holding demonstrates complete disregard for the action taken by the legislative branch of government with respect to a societal problem particularly within the sphere of authority consigned to its judgment.

As if the Supreme Court's ruling in *Bellanca* were not enough, our own court set forth the charter by which the Legislature could act. In Matter of *Beal Props. v State Liq. Auth.* (37 NY2d 861), we concluded on the rationale of the dissenting opinion below (45 AD2d 906 [COOKE, J.]), that the State Liquor Authority could not impose a sanction for nude dancing in a bar, inasmuch as that conduct, not lewd or indecent per se, had not been specifically proscribed by either statute or regulation (45 AD2d 906, 908, *supra*). The inescapable implication of the holding in that case is that once such a statute or regulation were adopted, the State Liquor Authority could properly prohibit nude dancing on licensed premises. The statute in question is nothing more than an effort to follow our direction that before such nonobscene conduct may be prohibited, it must be adequately detailed via statute or regulation so as to give notice to those who must abide by its dictates. I see no difference of constitutional magnitude between totally nude barroom dancing, which the court would apparently allow the Legislature to prohibit, and topless barroom dancing, which, according to the majority of this court, apparently the Legislature may not prohibit. I believe the Legislature acted properly, lawfully and constitutionally. Nonetheless, the majority has determined to go its own way and repudiate our own rationale in *Beal*. I dissent because I think the majority is wrong in so obdurately rejecting the direction of our prior precedent.

In conclusion, I stress, as I did in my previous dissent, that as Judges we are not to shut our eyes to reality: "No reasonable person, moralist or not, could deny that the ad-

mixture of alcohol and topless dancing presents a very real possibility of disturbances of the public peace in licensed premises, a problem which may be addressed in advance by the Legislature. The elected representatives of the people of this State have now chosen to avoid such disturbances by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Although some may believe this solution to be unwise or unnecessary, there exists no justification for disturbing the legislative judgment in this case" *(Bellanca v New York State Liq. Auth.*, 50 NY2d 524, 534, *supra)*.

Accordingly, I dissent and vote to uphold the constitutionality of subdivision 6-a of section 106 of the Alcoholic Beverage Control Law.

JASEN, J. (dissenting). I agree completely with the views expressed in the dissenting opinion of Judge GABRIELLI. There is, however, an additional and more fundamental reason that compels me to dissent in this case. In holding that subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is violative of the right to freedom of expression guaranteed by section 8 of article I of our State Constitution, the majority, in my view, misconceives the effect of the Twenty-first Amendment in terms of conferring a right upon this State, independent of the normal police power, to regulate the sale of liquor.

According to the majority, the Twenty-first Amendment has "no application" to our State Constitution. In their view, a State's right to regulate the sale of alcoholic beverages is derived solely from the police power. Pursuant to this line of reasoning, the majority is able to formulate a rather neat and seemingly logical argument, to wit: because our State Constitution contains no equivalent to the Twenty-first Amendment that counterbalances the right to free expression guaranteed by section 8 of article I, subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is invalid. I cannot agree.

Contrary to the majority's view, when a State acts to regulate the sale of liquor within its boundaries, its authority stems from *both* its general police power *and* directly from the Twenty-first Amendment to the United

States Constitution. Indeed, rather than merely restoring to the States their pre-existing police power over the sale of alcoholic beverages by repealing the Eighteenth Amendment, the second section of the Twenty-first Amendment expressly reserves to the States a power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Thus, although the States "require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." *(California v La Rue*, 409 US 109, 114.) This independent right to regulate the sale of liquor under the Federal Constitution has been interpreted by the Supreme Court as not only creating an exception to the commerce clause (e.g., *Seagram & Sons, v Hostetter*, 384 US 35, 41-42; *Ziffrin, Inc. v Reeves*, 308 US 132; *State Bd. v Young's Market Co.*, 299 US 59), but, more recently, as qualifying rights guaranteed by the First Amendment as well—at least insofar as certain forms of nude and partially nude entertainment are concerned. *(New York State Liq. Auth. v Bellanca*, — US —, 101 S Ct 2599; *California v La Rue, supra.)* Perhaps the most persuasive support for the proposition that the Twenty-first Amendment confers upon the States a right to control the sale of alcoholic beverages independent of the normal police power may be found in the contrary remarks of one of the dissenting Justices in this very case. (See *New York State Liq. Auth. v Bellanca supra*, at pp —, —, pp 2604-2605 [STEVENS, J., dissenting]; cf. *Craig v Boren*, 429 US 190, 204-208; *Wisconsin v Constantineau*, 400 US 433; see, generally, Note, Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Col L Rev 1578.)

Lest there be any further doubt on the subject, this court, on a prior occasion, has made clear that, notwithstanding a restoration of the normal police power, "the Twenty-first

Amendment spells out *an additional specific and federally protected right* of each State to eliminate as well as regulate the liquor traffic within its borders." *(Seagram & Sons v Hostetter*, 16 NY2d 47, 56, affd 384 US 35, *supra* [emphasis supplied].) Given the undisputed existence of this State's right under the Federal Constitution to regulate the sale of liquor, it is difficult to understand the majority's view, unsupported by the citation of any authority, that the Twenty-first Amendment has "no application" to our State Constitution. This Federally recognized power on the part of the States to control the commercial distribution of alcoholic beverages within their respective boundaries does not exist in a vacuum; nor is it limited to the confines of the Federal Constitution. The power conferred by the Twenty-first Amendment simply does not evaporate once the analysis shifts to a determination of the right to free expression under our State Constitution. Rather, this independent, Federal right to control the traffic in liquor subsists, and, pursuant to the supremacy clause,* must be given full recognition and effect—even when considering the provisions of our own Constitution.

Placed in this perspective, a proper resolution of the issue presented as a result of the Supreme Court's remand to us requires that the right to freedom of expression guaranteed by section 8 of article I of our State Constitution be weighed against the State's right to regulate the sale of alcoholic beverages. In this regard, subdivision 6-a of section 106 of the Alcoholic Beverage Control Law must be viewed as an exercise of both the police power and this State's independent right under the Twenty-first Amendment to control the sale of liquor within its boundaries. However, as I read the majority's opinion in this case, the right to freedom of expression guaranteed by our State Constitution is coextensive with the First Amendment right to free speech. (At pp 234-235.) If this be so, then, in view of the Supreme Court's determination in this case that the State's right to ban the

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* The supremacy clause (US Const, art VI) provides in relevant part: "This Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or Laws of any State to the Contrary notwithstanding." (Emphasis supplied.)

sale of liquor supercedes the protection afforded by the First Amendment, our State constitutional guarantee of freedom of expression must also give way to the Twenty-first Amendment. Therefore, the constitutionality of subdivision 6-a of section 106 of the Alcoholic Beverage Control Law should be sustained.

Of course, this court can recognize a right to freedom of expression under our State Constitution which is broader than the rights conferred under the First Amendment. (Cf. *People v Elwell*, 50 NY2d 231; *Cooper v Morin*, 49 NY2d 69; *Sharrock v Dell Buick-Cadillac*, 45 NY2d 152; *People v Isaacson*, 44 NY2d 511; *People v Hobson*, 39 NY2d 479.) In my view, however, this would be most unfortunate. There is no significant difference between the language of the First Amendment and of section 8 of article I of the New York Constitution. Nor is any compelling reason offered to justify such an expansion of the State right to freedom of expression. Finally, such a holding would require that we deviate, for the first time, from the Supreme Court's interpretation of constitutionally protected rights in this area.

In any event, the majority has declined to recognize any such broader right to freedom of expression under our State Constitution. In fact, the court continues to adhere to the principle that the guarantees of section 8 of article I are coextensive with the rights secured under the First Amendment. Instead, the majority, in the guise of effectuating our State constitutional right to freedom of expression, has struck down subdivision 6-a of section 106 of the Alcoholic Beverage Control Law simply by ignoring this State's independent right under the Federal Constitution to regulate the sale of liquor. As noted earlier, I have grave misgivings as to whether such a complete failure to recognize the effect of the Twenty-first Amendment upon our State Constitution accords with the mandate of the supremacy clause.

Finally, it should be noted that subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is not an across-the-board prohibition on topless dancing. Rather, the statute only bans topless dancing in establishments where liquor

is sold for on-premises consumption. This fact, when coupled with a recognition that such forms of entertainment "involve only the barest minimum of protected expression" (*Doran v Salem Inn*, 422 US 922, 932; accord *California v La Rue, supra*, at pp 117-118), causes plaintiffs' claim of unconstitutionality to be placed in serious doubt. In my view, subdivision 6-a of section 106 of the Alcoholic Beverage Control Law is a rational exercise of both the police power and this State's independent right under the Twenty-first Amendment to regulate the sale of liquor. Although some may question the wisdom behind a statute which prohibits the mixing of alcohol and nude dancing, in the words of the Supreme Court, "the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts." (*New York State Liq. Auth. v Bellanca, supra*, at p —, p 2602.)

For all these reasons, I would reverse the judgment of Supreme Court and uphold the constitutionality of subdivision 6-a of section 106 of the Alcoholic Beverage Control Law.

Judges WACHTLER, FUCHSBERG and MEYER concur with Judge JONES; Judge FUCHSBERG concurs in a separate opinion; Judge GABRIELLI dissents and votes to reverse in an opinion in which Chief Judge COOKE and Judge JASEN concur; Judge JASEN dissents in a separate dissenting opinion.

On reargument, following remand by the United States Supreme Court, judgment affirmed, with costs.

Statement of Case

DENNIS BELLANCA, Doing Business as THE MAIN EVENT, et al., Respondents, v NEW YORK STATE LIQUOR AUTHORITY et al., Appellants.

Argued April 30, 1980; decided June 10, 1980

SUMMARY

APPEAL, on constitutional grounds, from a judgment of the Supreme Court at Special Term (JOHN H. DOERR, J.), entered June 21, 1979 in Erie County, granting summary judgment to plaintiffs and declaring subdivision 6-a of section 106 of the Alcoholic Beverage Control Law unconstitutional as applied to topless dancing in premises licensed to sell liquor for consumption on the premises and, to that extent, enjoined its enforcement.

Plaintiffs are the owners of nightclubs, bars and restaurants which, for several years, have featured topless dancing. The plaintiffs also sell alcoholic beverages to their patrons for consumption on the premises, pursuant to licenses issued by the State Liquor Authority. The plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a of section 106 of the Alcoholic Beverage Control Law, recently amended to prohibit topless dancing in addition to other activities on licensed premises, is unconstitutional to the extent that it prohibits all topless dancing at premises licensed by the State Liquor Authority. No criminal penalty is provided for violating the statute, but a violation of this law may result in a loss of the liquor license. The trial court found that topless dancing is a type of expression protected by the First Amendment to the United States Constitution and that the State had failed to show some serious and compelling reason to limit it, stating that bland reliance on the Twenty-first Amendment is insufficient. Accordingly, the court declared subdivision 6-a unconstitutional as applied to topless dancing in licensed premises and, to that extent, enjoined its enforcement. The State appealed.

The Court of Appeals affirmed, holding, in an opinion by Judge WACHTLER, that topless dancing is entitled to at least a minimum of protection under the First Amendment and that the State cannot arbitrarily prohibit it in all places licensed to sell alcoholic beverages.

HEADNOTE

Intoxicating Liquors — Licenses — Topless Dancing

Topless dancing is not inherently obscene and is a form of expression

entitled to at least a minimum of protection under the First Amendment to the United States Constitution, although, since it involves conduct, it is subject to more restrictions than the more static arts; the State cannot prohibit topless dancing under all circumstances and neither may the State, under subdivision 6-a of section 106 of the Alcoholic Beverage Control Law, arbitrarily prohibit it at all places licensed to sell alcoholic beverages. Accordingly, since the State has failed to demonstrate that there is rational connection between the activity sought to be prohibited and the State's legitimate concern in controlling liquor consumption, the trial court properly declared subdivision 6-a unconstitutional as applied to topless dancing in licensed premises and, to that extent, enjoined its enforcement.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

3 NY JUR 2d, Alcoholic Beverages § 103
CLS, Alcholic Beverage Control Act § 106 subd 6-a
45 AM JUR 2d, Intoxicating Liquors § 285
10 AM JUR TRIALS 1, Obscenity Litigation

ANNOTATION REFERENCES

Construction and application of statute or ordinance respecting amusements on premises licensed for sale of intoxicating liquor. 4 ALR2d 1216.

Topless or bottomless dancing or similar conduct as offense. 49 ALR3d 1084.

* By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Robert Abrams, Attorney-General (Peter J. Dooley and *Shirley Adelson Siegel* of counsel), for appellants. The topless dancing ban here involved is within the State's broad power under the Twenty-first Amendment to regulate the dispensation of alcoholic beverages and is not an unconstitutional infringement of First Amendment rights of free speech. *(California v La Rue,* 409 US 109; *Matter of Zorach v Clauson,* 303 NY 161; *Salem Inn v Frank,* 501 F2d 18, affd *sub nom. Doran v Salem Inn,* 422 US 922; *Salem Inn v Frank,* 522 F2d 1045; *Inturri v Healy,* 426 F Supp 543; *Matter of Beal Props. v State Liq. Auth.,* 37 NY2d 861; *Defiance Milk Prods. Co. v Du Mond,* 309 NY 537; *I. F. L. Y. Co. v Temporary State Housing Rent Comm.,* 10 NY2d 263; *People v Broadie,* 37 NY2d 100.)

George P. Doyle for respondents. The Supreme Court, Erie County (DOERR, J.), was correct in declaring subdivision 6-a of section 106 of the Alcoholic Beverage Control Law unconstitu-

tional under the First and Fourteenth Amendments to the United States Constitution and section 8 of article I of the New York State Constitution. (*Salem Inn v Frank*, 522 F2d 1045; *California v La Rue*, 409 US 109; *Salem Inn v Frank*, 501 F2d 18, affd *sub nom. Doran v Salem Inn*, 422 US 922; *Lucifer's Gate v Town of Van Buren*, 83 Misc 2d 790; *Erznoznik v City of Jacksonville*, 422 US 205; *Southeastern Promotions v Conrad*, 420 US 546; *Matter of TJPC Rest. Corp. v State Liq. Auth.*, 61 AD2d 441; *Chapin v Town of Southampton*, 457 F Supp 1170; *Schneider v State*, 308 US 147.)

OPINION OF THE COURT

WACHTLER, J.

The question on this appeal is whether a provision of the Alcoholic Beverage Control Law (§ 106, subd 6-a) is unconstitutional insofar as it prohibits topless dancing at premises licensed by the State Liquor Authority. The Supreme Court, Erie County, held this portion of the statute unconstitutional. The State has appealed directly to this court pursuant to CPLR 5601 (subd [b], par 2).

The plaintiffs are the owners of nightclubs, bars and restaurants which, for several years, have featured topless dancing. The plaintiffs also sell alcoholic beverages to their patrons for consumption on the premises, pursuant to licenses issued by the State Liquor Authority. That agency has adopted rules prohibiting nudity and "lewd or indecent conduct" on premises licensed to sell alcohol.[1] The rules also specifically prohibit the licensee from permitting "any female" to appear with breasts "expose[d] to view" but, as originally adopted, contained an exception for topless dancing which, although not prohibited, was subject to strict regulation.[2]

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1. The rules provide that a license or permit may be revoked, canceled or suspended "For suffering or permitting on licensed premises (1) any lewd or indecent conduct or (2) any person to appear unclothed or in such manner or attire as to expose to view any portion of the pubic hair, anus, vulva or genitals, or any simulation thereof" (9 NYCRR 53.1 [r]).

2. This rule (former subd [s] of 9 NYCRR 53.1) provided that the licensee should not suffer or permit "any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof. The provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed by at least six feet from the nearest

In 1977 the Legislature added nearly identical provisions to the Alcoholic Beverage Control Law (L 1977, ch 321, § 1). However, this statute (Alcoholic Beverage Control Law, § 106, subd 6-a) did not carry forward the exception permitting topless dancing.[3] No criminal penalty is provided for violating this statute (see Alcoholic Beverage Control Law, § 130, subds 3, 5). But a violation of this law may result in a loss of the liquor license (9 NYCRR 53.1 [s]).

The plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a is unconstitutional to the extent it prohibits all topless dancing at premises licensed by the State Liquor Authority. The plaintiffs stated that they had always complied with the Liquor Authority's rules and restrictions with respect to topless dancing. In addition it was alleged that this activity is not observable from the public streets and the fact that it is featured is clearly noted on signs posted outside the plaintiffs' premises. "Consequently", the complaint states, "no person has been exposed to topless dancing performances at Plaintiffs' premises except by choice." In their first cause of action they argued that the topless dancing featured at their establishments "is not lewd or obscene within the meaning of the United States Constitution, and is a form of protected expression under the First Amendment." In the remaining three causes of action the plaintiffs claimed that subdivision 6-a is also overbroad, violates the equal protection clause and infringes on their freedom of expression guaranteed by section 8 of article I of the State Constitution. They therefore asked the court to declare subdivision 6-a unconstitutional to the extent that it prohibits topless dancing in licensed premises and also sought an injunction barring the State from enforcing this law in the future.

In response the State contended that "notwithstanding the Constitutional provisions which guarantee freedom of expression" it may, pursuant to the Twenty-first Amendment of the United States Constitution, "regulate the type of entertain-

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3. The statute reads as follows: "No retail licensee for on-premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola" (Alcoholic Beverage Control Law, § 106, subd 6-a).

ment in establishments licensed in this State to sell alcoholic beverages."[4]

The trial court recognized the State's broad power to control and regulate the sale of liquor in order to protect the public from its effects (*California v La Rue*, 409 US 109). It found, however, that topless dancing is "a type of expression protected by the First Amendment" and that the State had failed to "show some serious and compelling reason to limit it. Bland reliance on the Twenty-first Amendment is insufficient". Thus the court declared subdivision 6-a unconstitutional as applied to topless dancing in licensed premises, and to that extent, enjoined its enforcement.[5]

On this appeal the State contends that this judgment is inconsistent with the United States Supreme Court's holding in *California v La Rue (supra)*.

In *La Rue* the court held facially valid certain administrative rules regulating the type of entertainment that might be presented in bars and nightclubs licensed by the State. The rules prohibited what the court described as acts of "gross sexuality" including display of the genitals and live or filmed performances of sexual acts. They noted that before the rules were promulgated, hearings were held and it was shown that at premises where these acts were performed, "numerous incidents of legitimate concern to the Department had occurred" (*California v La Rue, supra*, at p 111). These incidents included "bacchanalian revelries" involving public sexual acts between customers and entertainers, as well as assaults, rape and indecent exposure committed at or near such premises.

In upholding the regulations the court observed that the Twenty-first Amendment, granting the States power over the sale and distribution of liquor within their borders, has been recognized as conferring on the States something more than the normal authority inherent in the police power. Although that amendment did not nullify the other provisions of the

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4. The Twenty-first Amendment, which repealed national prohibition, also provides in the second section: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

5. The court expressly relied on the First Amendment. Although it also concluded, summarily, that subdivision 6-a violated section 8 of article I of the State Constitution, we find it unnecessary to consider that question or the additional points raised in the complaint, since in our view, the First Amendment argument presented in the first cause of action is dispositive.

Constitution whenever the State seeks to regulate the sale of liquor, it did serve to "strengthen" the State's authority in that particular area. The court conceded that some of the performances prohibited by the regulations would be entitled to constitutional protection but noted that the regulations claimed to be invalid on their face, in "substance" prohibited performances "that partake more of gross sexuality than of communication" *(California v La Rue, supra,* at p 118). The State's conclusion that these acts should not be permitted at places authorized to sell liquor was held not to be "an irrational one" in light of "the evidence from the hearings" *(California v La Rue, supra,* at pp 115, 116). "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution" *(California v La Rue, supra,* at pp 118-119).

In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from appearing bare-breasted on their premises. Similarly the plaintiffs do not contest the State's right to place some restrictions on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter how, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances.

Thus unlike the court in *La Rue,* we are not confronted with a broad attack on the facial validity of a statute which in "substance" prohibits acts of "gross sexuality", most of which are probably criminally obscene as well. Here the challenge narrowly focuses on a rule prohibiting a single activity, topless dancing, which is not inherently obscene. On the contrary it has been legally recognized as a form of expression *(Doran v Salem Inn,* 422 US 922) like nudity in art and sculpture. Of

course involving conduct, as it does, it is undoubtedly subject to more restrictions than the more static arts. But although offensive to some, as all nudity or partial nudity is, it is nevertheless entitled to at least minimal protection under the First Amendment. Certainly the State could not prohibit topless dancing under all circumstances *(Doran v Salem Inn, supra)*. Neither, in our view, may the State arbitrarily prohibit it at all places licensed to sell alcohol.[6]

Here there is nothing in the record to show that the State's conclusion, that this activity should not take place at licensed premises, was rationally based on evidence demonstrating a need for the rule. Indeed it appears that the law was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting topless dancing subject to restrictions and the continued supervision of the State Liquor Authority.

The State urges however that we indulge an additional presumption and assume that the Legislature did investigate and find sufficient facts to support the legislation (see, e.g., *I. L. F. Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263, 269; *Defiance Milk Prods. Co. v Du Mond*, 309 NY 537). But even if the presumption could be held to be equivalent to the actual findings made in *La Rue*—a question we need not decide—it would be inappropriate in this case to presume that topless dancing posed a problem in premises licensed by the State Liquor Authority. It is, in fact, hard to imagine that the agency, which is so vigilant in enforcing the liquor laws and its own regulations would have continued to permit topless dancing at premises authorized to sell liquor if the audiences degenerated into "bacchanalian revelries" or became involved in "incidents of legitimate concern" to the

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6. We recognize, as the dissent does, that in *Doran* the Supreme Court observed, in dictum (at pp 932-933), that they had concluded in *La Rue* that "the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program". We also note, however, that more recently the Supreme Court has taken a narrower view of its holding in *La Rue*, indicating, again by way of dictum, that in that case they had simply "relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication'" *(Craig v Boren*, 429 US 190, 207). We, of course, do not consider this dictum any more controlling than the contrary dictum in *Doran*. What we do consider dispositive are the factors which the Supreme Court discussed so extensively and actually relied upon in *La Rue* as noted above.

State. Notably, even in California where such incidents occurred in bars permitting gross sexuality, the State found no need to prohibit topless dancing. It simply imposed restrictions similar to those previously found acceptable by the State Liquor Authority in this State (see *La Rue v California*, 326 F Supp 348, 359).

The State's power to control and regulate the sale of alcoholic beverages is designed to protect the public from abuses related to alcohol consumption. It is not a license to censor whatever occurs at premises authorized to sell alcohol. Thus when the State employs this power in such a way as to infringe on activities entitled to some constitutional protection, it must at least demonstrate that there is a rational connection between the activity sought to be prohibited and the State's legitimate concern in controlling liquor consumption.[7] On the record before us there is nothing which would rationally support a conclusion that in this State it is dangerous to mix alcohol and topless dancing.

Accordingly the judgment of the Supreme Court, Erie County, should be affirmed.

GABRIELLI, J. (dissenting). I am impelled to dissent, for the holding of the majority is based upon what I perceive to be a misstatement of the law as enunciated by the United States Supreme Court in *Doran v Salem Inn* (422 US 922) and *California v La Rue* (409 US 109).

At issue on this appeal is the power of a State to prohibit topless dancing in an establishment which sells liquor for on-premises consumption. The majority finds this prohibition to be unconstitutional, apparently premising this conclusion upon the belief that the State bears the burden of justifying the rationality of its ban upon topless dancing in drinking establishments, because topless dancing is entitled to some First Amendment protections. The most recent pronouncements of the Supreme Court upon this subject, however, are expressly to the contrary (see *California v La Rue, supra*, at pp 118-119; *Doran v Salem Inn, supra*, at pp 932-933).

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7. Of course when the State seeks to prohibit more traditional forms of expression, it must make a more compelling showing of need for the restriction. For instance, it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide.

When a State acts to regulate the sale of liquor within its boundaries, its authority stems not merely from the normal police power of the State, but also directly from the Twenty-first Amendment to the United States Constitution. This grant of power by the Constitution serves to increase that authority which a State normally enjoys and to place a significantly greater burden upon a party seeking to challenge a State regulation of liquor as violative of some other provision of the United States Constitution. This is not to suggest that a State acting under the authority of the Twenty-first Amendment is free to ignore all other parts of the Federal Constitution (see, e.g., *Wisconsin v Constantineau,* 400 US 433; *Craig v Boren,* 429 US 190). Rather, the effect of the Twenty-first Amendment is to require those who would challenge a State regulation of liquor on the ground that it is violative of some other constitutional provision or of supreme Federal law, to prove that the particular interplay of provisions and purposes in each case mandates a disregard of the State's otherwise legitimate powers (compare *Hostetter v Idlewild Liq. Corp.,* 377 US 324, *Seagram & Sons v Hostetter,* 384 US 35, and *State Bd. v Young's Market Co.,* 299 US 59, with *California Liq. Dealers v Midcal Aluminum,* 445 US 97).

In the instant case, plaintiffs claim that the ban on topless dancing in establishments which sell liquor for on-premises consumption is violative of the First Amendment. It is, of course, far too late in the day to suggest that dancing, even topless or nude dancing, is entitled to absolutely no First Amendment protections. Indeed, in both *California v La Rue* (409 US 109, 118, *supra)* and *Doran v Salem Inn* (422 US 922, 932, *supra)* the Supreme Court specifically recognized that such "entertainment" is not bereft of all protection because it does have some communicative aspects. At the same time, however, the court noted, with care, that such "art" forms "involve only the barest minimum of protected expression" *(Doran v Salem Inn, supra,* at p 932; accord *California v La Rue, supra,* at pp 117-118).

Because topless barroom dancing has so little communicative content and is accordingly entitled to only a minimum of First Amendment protection, whereas the State has the responsibility and, under the Twenty-first Amendment, the power to regulate the sale and use of liquor, the Supreme Court has declared not only that a statute prohibiting or limiting such dancing must be upheld unless it is clearly

irrational, but also that the burden is on the challenger of such a law to overcome a presumption of constitutionality and prove that the law is irrational *(California v La Rue, supra,* at pp 118-119). Indeed, in *Doran v Salem Inn,* the court expressly stated that "[i]n *La Rue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program" (422 US, *supra,* at pp 932-933). Moreover, and of great significance, in that same opinion the court intimated that the ban on topless dancing there involved would clearly have been constitutional had it been enacted pursuant to the State's powers under the Twenty-first Amendment and accordingly limited to establishments selling liquor *(Doran v Salem Inn, supra,* at p 933).

Applying these principles to the instant case, it is painfully obvious that the challenged statute is indeed valid and constitutional. Clearly, plaintiffs have not met their burden of proving this particular exercise of the State's power to regulate the sale of liquors to be irrational. Indeed, even the majority of this court appears to have impliedly conceded that plaintiffs have failed to meet this burden since, in order to declare the statute unconstitutional, the majority is forced to place the burden of proving the statute's reasonableness upon the State, in direct contradiction to the doctrine enunciated in *La Rue.* Moreover, this statute does contain the very limitations which the Supreme Court indicated would have sufficed to place the ordinance at issue in *Doran* beyond challenge. Hence I find it impossible to concur in the result reached by a majority of this court today.

In conclusion, I must emphasize that Judges called upon to determine the constitutionality of a challenged statute are required to set aside their personal opinions of what is best and strive "to resolve the issue by constitutional measurement, free of emotion and of predilection" *(Roe v Wade,* 410 US 113, 116). This is so for the very basic reason that "the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution" *(Lochner v New York,* 198 US 45, 76 [HOLMES, J., dissenting]). In his official capacity, a Judge may serve neither as a moralist nor as a libertine, but simply

must endeavor to decide each case on the basis of the applicable law. Whatever artistic or communicative value may attach to topless dancing is here overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. No reasonable person, moralist or not, could deny that the admixture of alcohol and topless dancing presents a very real possibility of disturbances of the public peace in licensed premises, a problem which may be addressed in advance by the Legislature. The elected representatives of the people of this State have now chosen to avoid such disturbances by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Although some may believe this solution to be unwise or unnecessary, there exists no justification for disturbing the legislative judgment in this case.

Accordingly, I dissent and vote to reverse the judgment appealed from and to declare the statute to be constitutional.

Judges JONES, FUCHSBERG and MEYER concur with Judge WACHTLER; Judge GABRIELLI dissents and votes to reverse in a separate opinion in which Chief Judge COOKE and Judge JASEN concur.

Judgment affirmed, with costs.

SUPREME COURT OF THE UNITED STATES

N. Y. STATE LIQUOR AUTHORITY v. BELLANCA

Cite as 101 S.Ct. 2599 (1981)

PER CURIAM.

The question presented in this case is the power of a State to prohibit topless dancing in an establishment licensed by the State to serve liquor. In 1977, the State of New York amended its Alcoholic Beverage Control Law to prohibit nude dancing in establishments licensed by the State to sell liquor for on-premises consumption. N.Y.Alco. Bev.Cont.Law, § 106 (subd. 6a) (1977).[1] The statute does not provide for criminal penalties, but its violation may cause an establishment to lose its liquor license.

Respondents, owners of nightclubs, bars, and restaurants which had for a number of years offered topless dancing, brought a declaratory judgment action in state court, alleging that the statute violates the First Amendment of the U.S. Constitution insofar as it prohibits all topless dancing in all licensed premises. The New York Supreme Court, 50 N.Y.2d 524, 429 N.Y.S.2d 616, 407 N.E.2d 460, declared the statute unconstitutional and the New York Court of Appeals affirmed by a divided vote. It reasoned that topless dancing was a form of protected expression under the First Amendment and that the State had not demonstrated a need for prohibiting "licensees from

1. The statute provides:

"No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the

presenting nonobscene topless dancing performances to willing customers." The dissent contended that the statute was well within the State's power, conferred by the Twenty-first Amendment, to regulate the sale of liquor within its boundaries.[2] We agree with the reasoning of the dissent and now reverse the decision of the New York Court of Appeals.

[1, 2] This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128 (1939). It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), we upheld the facial constitutionality of a statute prohibiting acts of "gross sexuality," including the display of the genitals and live or filmed performances of sexual acts, in establishments licensed by the State to serve liquor. Although we recognized that not all of the prohibited acts would be found obscene and were therefore entitled to some measure of First Amendment protection, we reasoned that the statute was within the State's broad power under the

breast below the top of the areola, or any simulation thereof."

2. The Twenty-first Amendment provides in relevant part that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Twenty-first Amendment to regulate the sale of liquor.

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1974), we considered a First Amendment challenge to a local ordinance which prohibited females from appearing topless not just in bars, but "any public place." Though we concluded that the District Court had not abused its discretion in granting a preliminary injunction against enforcement of the ordinance, that decision does not limit our holding in *LaRue*. First, because *Doran* arose in the context of a preliminary injunction, we limited our standard of review to whether the District Court abused its discretion in concluding that plaintiffs were *likely* to prevail on the merits of their claim, not whether the ordinance actually violated the First Amendment. Thus, the decision may not be considered a "final judicial decision based on the actual merits of the controversy." *University of Texas v. Camenisch*, —— U.S. ——, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Second, the ordinance was far broader than the ordinance involved either in *LaRue* or here, since it proscribed conduct at "any public place," a term that "could include the theatre, town hall, opera place, as well as a marketplace, street or any place of assembly indoors or outdoors." 422 U.S., at 933, 95 S.Ct., at 2568. Here, in contrast, the State has not attempted to ban topless dancing in "any public place": As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor. Indeed,

we explicitly recognized in *Doran* that a more narrowly drawn statute would survive judicial scrutiny:

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, [93 S.Ct. 390, 34 L.Ed.2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquors conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program." 422 U.S., at 932–933, 95 S.Ct., at 2568–2569.

[3] Judged by the standards announced in *LaRue* and *Doran*, the statute at issue here is not unconstitutional. What the New York Legislature has done in this case is precisely what this Court has said a State may do in *Doran*. Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.

Respondents nonetheless insist that *LaRue* is distinguishable from this case, since the statute there prohibited acts of "gross

sexuality" and was well-supported by legislative findings demonstrating a need for the rule. They argue that the statute here is unconstitutional as applied to topless dancing because there is no legislative finding that topless dancing poses anywhere near the problem posed by acts of "gross sexuality." But even if explicit legislative findings were required to uphold the constitutionality of this statute as applied to topless dancing, those findings exist in this case. The purposes of the statute have been set forth in an accompanying legislative memorandum, N.Y. State Legislative Annual, 150 (1977).

> "Nudity is the kind of conduct that is a proper subject of legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law . . . .
>
> "Common sense indicates that any form of nudity coupled with alcohol in public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."

In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the state regulation" conferred by the Twenty-first Amendment, *California v. LaRue*, *supra*, 409 U.S. at 118, 93 S.Ct. at 397, we cannot agree with the New York

Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Accordingly, the petition for certiorari is granted and the judgment of the New York Court of Appeals is reversed for further proceedings not inconsistent with this opinion.

Justice MARSHALL concurs in the judgment.

Justice BRENNAN dissents from the summary disposition and would set the case for oral argument.

Justice STEVENS, dissenting.

Although the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question.[1] Today the Court construes the Twenty-first Amendment as a source of power permitting the State to prohibit such

1. See *Doran v. Salem, Inn., Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–558, 95 S.Ct. 1239, 1245–1246, 43 L.Ed.2d 448; *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342; *Schad v. Borough of Mt. Ephriam*, — U.S. —, 101 S.Ct. 2176, 68 L.Ed.2d —.

presumably protected activities in establishments which serve liquor. The Court relies on *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, for that construction of the Twenty-first Amendment. The rationale of today's decision however, is not the same as the explanation the Court gave for its holding in that case. The syllogism supporting today's conclusion includes the premise that the State's Twenty-first Amendment power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where activity assumed to be protected by the First Amendment occurs.[2] If that reasoning is sound, then a State may ban any protected activity on such premises, no matter how innocuous or, more importantly, how clearly protected.[3]

In *California v. LaRue*, instead of relying on the simplistic reasoning employed by the Court today, the Majority analyzed the issue by balancing the State's interests in preventing specifically identified social

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2. "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Ante*, at 2601.

3. Rejecting this reasoning, the New York Court of Appeals noted that "it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide." 50 N.Y.2d 524, 531, n. 7, 429 N.Y.S.2d 616, 620, n. 7, 407 N.E.2d 460, 464, n. 7.

harms against the minimal interest in protected expression implicated by nude dancing.[4] The opinion reflected the view that the degree of protection afforded by the First Amendment is a variable, and that the slight interest in free expression implicated by naked and lewd dancing was plainly outweighed by the State's interest—supported by explicit legislative findings—in maintaining order and decency.[5] The

4. The Court's opinion in *LaRue* recounted in explicit detail the undesirable consequences—described in evidence adduced at public hearings—resulting from the performance of lewd or naked dancing and entertainment in bars and cocktail lounges. See 409 U.S., at 111–112, 93 S.Ct., at 393–394. After emphasizing the State's interests in eliminating those consequences the Court turned to a discussion of the First Amendment and stated that "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible State regulations significantly increases." *Id*, at 117, 93 S.Ct., at 396.

5. In minimizing the First Amendment interests in nude dancing and recognizing the State's interest in regulating such behavior, the Court stated:

"The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication.

. . . . .

[W]e conceive the State's power in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interest for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of

Twenty-first Amendment provided the Court with an "added presumption," *id.*, at 118, 93 S.Ct., at 397, to tip the scales in the direction of law and order,[6] but the opinion's evaluation of the conflicting interests would surely have led to the same result without that makeweight.[7]

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bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *Id.*, at 118, 93 S.Ct., at 397.

6. The Court recognized that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare, and morals." *Id.*, at 114, 93 S.Ct., at 395. In discussing decisions construing the Twenty-first Amendment, however, the Court noted that, "[t]hese decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.*, at 115, 93 S.Ct., at 395.

7. In discussing the Twenty-first Amendment, the Court recognized that the States, "vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, . . ." *Id.*, at 114, 93 S.Ct., at 395. The Court held that the Department of Alcoholic Beverage Control's

"conclusion . . . that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.*, at 118–119, 93 S.Ct., at 397.

The explicit legislative findings on which the Court heavily relied in *LaRue* have no counterpart in this case. The 1977 Amendment to the New York Alcohol Beverage Control Law left in place the prohibition against nude dancing that had been in effect for some time. Prior to 1977, topless dancing had been permitted subject to regulation that required the performer to dance on a stage that was inaccessible to patrons.[8] The State has not indicated that the New York Legislature was presented with any evidence to the effect that this regulated form of entertainment had produced any undesirable consequences. A memorandum in the New York State Legislature Annual for 1977, see *ante*, at 2601, notes that nudity had "long been held" to constitute disorderly behavior within the meaning of the law as it then existed, but that memorandum sheds no light whatever on the decision to prohibit topless dancing

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8. The pre-1977 regulation prohibited the licensee from permitting "any female to appear on licensed premises" so as "to expose to view any portion of the breast below the top of the areola" but contained an exception for "any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed by at least six feet from the nearest patron." See 50 N.Y.2d, at 526, n. 2, 429 N.Y.S.2d, at 617, n. 2, 407 N.E.2d at 461, n. 2. The 1977 Amendment incorporated the general prohibition of topless dancing but did not incorporate the exception. See N.Y.Alco.Bev.Cont.Law, § 106 (subd. 6a) (1977).

as well as nudity.[9] The New York Court of Appeals stated that this law "was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting topless dancing subject to restrictions and the continued supervision of the State liquor authority." 50 N.Y.2d 524, 530, 429 N.Y.S.2d 616, 620, 407 N.E.2d 460, 464.

I therefore believe that we must assume that the pre-1977 regulation adequately avoided the kind of "gross sexuality" that gave rise to the regulation challenged in *LaRue*. Although the emphasis on the legislative findings in this Court's opinion in

9. The New York Court of Appeals recognized the difference between nude and topless dancing and emphasized the limited nature of respondents' challenge:

"In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from appearing barebreasted on their premises. Similarly the plaintiffs do not contest the State's right to place some restriction on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter how, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances." 50 N.Y.2d, at 529, 429 N.Y.S.2d, at 619, 407 N.E.2d, at 463.

LaRue may have merely disguised the Court's real holding, the Court is quite wrong today when it implies that the factors that supported the holding in *LaRue* are also present in this case. This case does not involve "gross sexuality" or any legislative explanation for the 1977 change in the law to prohibit topless dancing.

Having said this, I must confess that if the question whether a State may prohibit nude or partially nude dancing in commercial establishments were squarely confronted on its merits, I might well conclude that this is the sort of question that may be resolved by the elected representatives of a community. Sooner or later that issue will be briefed and argued on its own merits.[10] I dissent in this case because I believe the Court should not continue to obscure that issue with irrelevancies such as its mischievous suggestion that the Twenty-first Amendment gives States power to censor free expression in places where liquor is

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10. If topless dancing is entitled to First Amendment protection, it would seem to me that the places where it should most appropriately be conducted are places where alcoholic beverages are served. A holding that a State liquor board may forbid its licensees from allowing such dancing on their premises may therefore be the practical equivalent of a holding that the activity is not protected by the First Amendment.

served.[11] Neither the language[12] nor the history of that Amendment provides any support for that suggestion.[13] Nor does

11. In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350, the Court recognized the effect of the Twenty-first Amendment on the Commerce Clause but included a reminder that is pertinent here:

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332, 84 S.Ct., at 1298.

That admonition is even more important in the context presented by the instant case, inasmuch as the drafters of the Twenty-first Amendment clearly intended the Amendment to have some impact on the Commerce Clause. That conclusion, contrary to the Court's reasoning, is totally unsupported with respect to the First Amendment.

12. In *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 106–107, 100 S.Ct. 937, 943–944, 63 L.Ed.2d 233, the Court rejected a claim that the Twenty-first Amendment prohibited the application of the Sherman Act to California's system of wine pricing and pointed out that in "determining State powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision . . . ." The difference between the Court's interpretation of the Twenty-first Amendment and its plain language is quite dramatic. The pertinent section of that Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

13. In *Craig v. Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 461–462, 50 L.Ed.2d 397, the Court stated that "this Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." The Court then unequivocally

LaRue justify it.[14] Without any aid from the Twenty-first Amendment, the State's ordinary police powers are adequate to support the prohibition of nuisances in taverns or elsewhere. Cf. *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310.

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rejected the Twenty-first Amendment as a basis for sustaining State liquor regulations that otherwise violated the Equal Protection Clause:

"Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials, 258 (1975). Any departures from this historical view have been limited and sporadic." Cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515. Surely the First Amendment is entitled to a status equal to the Fourteenth Amendment.

14. Ironically, today the Court adopts an argument that the appellant expressly disclaimed during the oral argument in *LaRue*:

"QUESTION: Mr. Porter, in your argument here, is it based at all on the Twenty-First Amendment, dealing with the State authority over regulation of alcoholic beverages?

"MR. PORTER: Based to the extent that if we are in the First Amendment area, then as far as balancing the State's interests, we submit that both the traditional power that a State has had over the conditions surrounding the sale of alcoholic beverages and the power given to the States under the Twenty-First Amendment must be considered in balancing the State interests, that these are substantial and important State interests, where we're talking about

Although I voted to deny certiorari and allow the decision of the highest court of the State of New York to stand, certiorari having been granted. I dissent from the Court's disposition of the case on the basis of a blatantly incorrect reading of the Twenty-first Amendment.

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the conditions surrounding the sale and consumption of alcoholic beverages.

"We have never argued, nor would we ever argue, that the Twenty-First Amendment would automatically override the First Amendment, or any other part of the Constitution. We only urge that—

"QUESTION: Well, it has been held that the Twenty-First Amendment overrode a great deal of the commerce clause, hasn't it?

"MR. PORTER: Well,—

"QUESTION: And it does, by its terms.

"MR. PORTER: That's correct, but—

"QUESTION: And it has been held that the Twenty-First Amendment overrode a good deal of the equal protection clause of the Fourteenth Amendment, hasn't it? It was in the *Younger* case.

"MR. PORTER: Yes, but I would submit that—or I would, myself, attempt to temper that somewhat, to the extent I think it shows an overriding State interest in weighing between the commerce clause and the Twenty-First Amendment, where you get up in equal protection, where you get up into the First Amendment or some so-called, alleged, preferred amendments of the Constitution.

"As I said, we do not argue that it overrides the First Amendment. If we're dealing in a First Amendment area, that great weight should be given to the State's interest and power under the Twenty-First Amendment, and balancing and weighing, the State interest outweigh the State interest to be protected under the First Amendment." *California v. LaRue*, O.T.1972, No. 71-36, Tr. of Oral Arg., 10-12.

Amicus Brief

81-1598

NO. 80-813

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK STATE LIQUOR AUTHORITY,
Petitioner,

-against-

DENNIS BELLANCA, d/b/a The Main Event; JAMES C. DeMARCO, d/b/a Colonie Restaurant; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a Frank's Casa Nova; VINCENT IUDICE, d/b/a 19th Hole Restaurant; PETER KACHINOSKI, d/b/a Kach's Corner; JACOB P. PAGANO, d/b/a The Silver Coach; RON PAOLINI, d/b/a Fridays and Saturdays Lounge; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a Shveedee's Lounge; NEAL RADICE, d/b/a Radice's Lounge; SAMUEL RESMAN, d/b/a Glo Mar Bar; TALE OF THE TIGER, Inc., d/b/a Flay's Steak Pub; LEONARD ZAMBITO, d/b/a Lenny's Blue Velvet Lounge,
Respondents.

BRIEF OF AMICUS CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to the Supremacy Clause (US Const, Art VI, cl 2), is not the Twenty-first Amendment as much a part of the law of every State as its own constitution?

2. Can the Federal constitutional guarantee of power to the States to regulate the sale of alcoholic beverages, which this Court has construed to include the power to prohibit such sale, on premises which feature topless dancing, without violating the First Amendment, be limited by a State constitutional guarantee of rights of free expression to topless barroom dancers?

3. Is the decision of the New York State Court of Appeals on reargument consistent with the remand of this Court?

PARTIES

All parties to the action are named in the caption. On reargument of this case following the remand of this Court (*State Liquor Authority v. Bellanca, et al.*, __ US __ 49 USLW 3950, 101 S Ct 2599, 69 L Ed 357 [June 22, 1981]), the Association of Adult Entertainment Taverns appeared as amicus curiae in the New York State Court of Appeals and are seeking to appear amicus curiae in the United States Supreme Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980
80-813

NEW YORK STATE LIQUOR AUTHORITY,
Petitioner,

-against-

DENNIS BELLANCA, d/b/a The Main Event;, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

Jay M. Zerin, on behalf of the Association of Adult Entertainment Taverns, seeks to appear amicus curiae in the United States Supreme Court.

JURISDICTION

28 USC 1257(3).

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Art VI, cl 2

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State of the Contrary notwithstanding."

Constitution of the United States, Amendment X

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution of the United States, Amendment XXI, Section 2

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the Laws thereof, is hereby prohibited."

New York State Constitution, Art. I, Section 8

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

Article 19, Section 1 of the New York State Constitution

"Any amendment or amendments to this constitution may be proposed in the senate and assembly, whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.

New York State Alcoholic Beverage Control Law, Section 106(6-a) (New York Session Laws, 1977, ch 321; McKinney's Consolidated Laws of New York, Vol 3, pocket supplement 1981-1982, p. 60

"No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the public area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof."

Statement of the Case

Respondents are operators of licensed premises featuring so-called "topless entertainment." In 1977, following this Court's decision in *Doran v. Salem Inn, Inc.*, 422 US 922, the New York State Legislature amended the Alcoholic Beverage Control Law to ban topless waitresses and topless female dancers in bars and nightclubs. (The statute would not apply to legitimate theaters where stage and seating areas are not part of the licensed premises.) Respondents initiated an action for a declaratory judgment and injunctive relief in State Supreme Court seeking to have the amendment declared unconstitutional under the State and Federal Constitutions, alleging that they would lose "business if dancers' breasts were required to be covered", and that the amendment is violative of the guarantees of freedom of expression under the State and Federal Constitutions.

State Supreme Court granted summary judgment to the respondents on the complaint. Petitioner appealed to the New York State Court of Appeals, which by a divided Court (4-3) affirmed judgment for respondents solely on Federal First Amendment grounds (50 NY2d 524, at 528, fn 5).

On certiorari, this Court reversed the State Court of Appeals, holding that the State's broad power under the Twenty-first Amendment to ban the sale of alcoholic beverages entirely, includes the lesser power to ban the sale of liquor on premises where topless dancing occurs (A-35).

> "Whatever artistic or communicative value m y attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts."

This Court remanded the case for further proceedings not inconsistent with that opinion.

On the hearing following this Court's remand, the New York State Court of Appeals by the very same 4-3 vote which occurred initially, held that the Twenty-first Amendment "has no application" to the State Constitution and that the statute violated the State Constitution's guarantee of freedom of speech (54 NY2d 228, 230). The Court of Appeals expressly declined to consider whether it would interpret the state constitutional guarantee to be broader than that of the First Amendment (54 NY2d 228, 234-235).

ARGUMENT

POINT I.

The United States Supreme Court has recently decided this issue.

In the case of *Pruneyard Shopping Center and Fred Sahadi v. Robins,* 447 U.S. 74, 100 Sup.Ct. 2035, the court decided the issue involved. In that case, the California Supreme Court had found a First Amendment right to distribute material in areas of a shopping center which material was not connected to the business of the shopping center. The United States Supreme Court found that the State of California which has a First Amendment provision in its state constitution may give broader effect to such constitutional provision than the United States Supreme Court would do with the First Amendment to the United States Constitution. The shopping center relying upon *Lloyd Corp. v. Tanner,* 407 U.S. 551, was rebuffed in the *Pruneyard* decision, *supra.*

Justice Rehnquist writing for the Court in *Pruneyard, supra,* stated:

> " 'our reasoning in *Lloyd,* however, does not ex proprio vigore limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."

Justice Rehnquist citing with approval therefore *Cooper v. California,* 386 U.S. 58, 62, 87 Sup.Ct. 788.

Justice Marshall writing a concurring opinion in the *Pruneyard* case, *supra,* stated as follows:

> I applaud the court's decision, which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution.

It is clear therefore that a state court can and should interpret its constitutional decisions by giving them broader effect than identical constitutional provisions of the Federal Constitution.

POINT II.

The Supreme Court has never determined that the Twenty-First Amendment to the United States Constitution imposes upon the State an obligation to regulate the control of alcoholic beverages, or the conditions of said sale in derogation of its own state constitutional guarantees.

The State of New York has in decisions of its courts consistently held that topless dancing was protected activity even where such activity was used in connection with the sale of alcoholic beverages. The court in *Bellanca v. New York State Liquor Authority,* 50 NY2d 524 [June 22, 1981], states:

> "The State's power to control and regulate the sale of alcoholic beverages is designed to protect the public from abuses related to alcohol consumption. It is not a license to censor whatever occurs at premises authorized to sell alcohol.

Further, the Chief Judge of the Court of Appeals now in dissent in *Bellanca,* when sitting as a justice of the Appellate Division, Third Department in the case of *Beal Properties, Inc. v. State Liquor Authority,* 45 App. Div.

2d 906 cited with approval the language of the United States Second Circuit Court of Appeals in *Salem Inc. v. Frank,* 501 F.2d 18 as follows:

> "Dancing is a form of expression protected by the first amendment. Even nude dancing in a bar can be within the constitutional protection of free expression."

The state may not abrogate its own constitutional state provisions without acting appropriately under state law. In order to modify the state constitution, a constitutional amendment is necessary excluding from free speech protections, under state law, the area of topless dancing in premises serving alcoholic beverages. This is true even though the Twenty-first Amendment confers upon the states the power to regulate or even ban the sale of alcoholic beverages. This they may do but they must act within the provisions of their own state constitution.

CONCLUSIONS

For the foregoing reasons, the instant petition for a writ of certiorari should be denied.

Respectfully submitted,

JAY M. ZERIN
Attorney for Association of Adult Entertainment Taverns

April 8, 1982